IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-2274 & 14-2275

UNITED STATES,
Plaintiff-Appellant (No. 14-2774),

SIERRA CLUB,
Plaintiff-Appellant (No. 14-2775),

v.

DTE ENERGY CO. AND DETROIT EDISON CO.
Defendant-Appellees.

On Appeal from the U.S. District Court for the Eastern District
Of Michigan, No. 10-13101 (Hon. Bernard A. Friedman).

PLAINTIFF-APPELLANT UNITED STATES' OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

The Court's decision does not merit further review. DTE's arguments for panel rehearing and rehearing en banc all begin with the premise that the Court misinterpreted *DTE I*. That premise is wrong. This Court's decision (*DTE II*) is consistent with *DTE I*—and with case law from the other courts to address New Source Review (NSR).

The decision does not satisfy the requirements for rehearing en banc. The decision does not conflict with any other decision of this Court, other courts of appeals, or the Supreme Court, or otherwise address a question of exceptional importance. *See* FED. R. APP. P. 35.

Nor have petitioners met the standard for panel rehearing. DTE simply reargues "issues previously presented" in the briefing of the second appeal. *See* 6th Cir. I.O.P. 40(a). The petition alleges no error of fact or law other than claiming that the Court misinterpreted *DTE I*, decided by the same panel of judges.

With regard to the issues presented in the petition for rehearing, *DTE I* and *DTE II* are correct and consistent with the law of other circuits. The decisions hold that EPA may bring a Clean Air Act enforcement action for a power plant operator's failure to obtain a preconstruction permit and meet other preconstruction NSR requirements. In such an action, EPA can provide evidence of appropriate, preconstruction emissions analyses, and need not simply accept the operator's projections at face value. That holding is consistent with the numerous decisions of

other courts holding that EPA may bring an NSR enforcement action based on what the defendant "expected or should have expected" at the time of construction. *See, e.g., United States v. Ala. Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013); *see also infra* p. 6 n.3 (listing cases).

The Court of Appeals has done its job. The petitions should be denied.

BACKGROUND

This appeal concerns the New Source Review provision of the Clean Air Act. NSR is a complex regulatory program based on a simple statutory command. Before a large *new* source of emissions can be built, the owner must get a permit that includes pollution control requirements. To avoid creating a perverse incentive to rebuild old plants rather than construct new ones, the same requirements apply to existing sources when they are modified. In general, permits are required where the modification would result in greater levels of emissions than the facility generated before construction. *See generally United States v. DTE Energy*, 711 F.3d 643, 645-46 (6th Cir. 2013) (*DTE I*). A source must project its future emissions before beginning work; if the predicted emissions increase is 40 tons or more (for the pollutants in this case), the source must comply with NSR.

Here DTE spent $65 million to update a power plant unit after nearly four decades of service. DTE's own preconstruction calculations predicted emissions would increase by thousands of tons. However, DTE asserts that no permit was necessary because a regulatory exemption known as the demand growth exclusion

excused the entire predicted increase.

Under that provision, a source may exclude any portion of a preconstruction, predicted emissions increase if the emissions (1) "could have been accommodated" before the work and (2) are "unrelated to the particular project." 40 C.F.R. § 52.21(b)(41)(ii)(*c*); *see also DTE I*, 711 F.3d at 650. Whether the exemption applies "is a fact-dependent determination that must be resolved on a case-by-case basis." *DTE I*, 711 F.3d at 646. Because it is an exemption, DTE bears the burden to show that the demand growth exclusion applies in this case. Yet the company's reading of *DTE I* would prevent the United States from challenging the legal *or* factual basis for its demand growth claims—even at summary judgment. *Cf. Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 917 (7th Cir. 1990) ("EPA cannot reasonably rely on a utility's own unenforceable estimates of its annual emissions"). Denying the petitions will return this case to the district court, where the Parties and the court will decide the optimal way to proceed and resolve the claims.

ARGUMENT

Rehearing is unwarranted as neither the standard for rehearing nor rehearing en banc is met. DTE does not demonstrate otherwise, barely addressing the relevant standards. DTE simply argues that the Court misunderstands *DTE I*, which does not provide a basis for rehearing.

I. THE PETITION FOR REHEARING EN BANC SHOULD BE DENIED.

Rehearing en banc is unwarranted because review is not necessary to maintain the uniformity of the court's decisions and the case does not involve a question of exceptional importance. *See* FED. R. APP. P. 35(a). In DTE's one-page en banc argument, DTE contends only that the judgment is unjust and the mandate unclear. *See* DTE Petition for Rehearing and Reheearing En Banc (Pet.) 18-19. Those arguments do not satisfy the standard for en banc review and misread *DTE II*.

A. *DTE II* presents no conflict with binding precedent.

DTE II poses no conflict with Sixth Circuit or Supreme Court precedent. The only conflict DTE alleges is with *DTE I*, but the two decisions are in accord.

DTE I held that: "A preconstruction projection is subject to an enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations." 711 F.3d at 652. That decision noted that the Clean Air Act "'lodges in the Agency encompassing supervisory responsibility over the construction and modification of pollutant emitting facilities.'" 711 F.3d at 649-50 (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 484 (2004)). *DTE I* also made clear that where a source fails to follow the rules, and "proceeds to construction, it is subject to an enforcement proceeding." *Id.* at 649. The Court explained that, if EPA were barred from challenging such projections, NSR "would cease to be a preconstruction review program." *Id.*

Upon the second appeal, two judges from the original panel ruled that *DTE I* *compelled* reversing the district court's summary judgment decision. *DTE II* holds that EPA can bring an enforcement action challenging DTE's assessment that no emissions increase would result from construction. *United States v. DTE Energy Co.*, 845 F.3d 735, 740 (6th Cir. 2017) (*DTE II*) ("EPA is not prevented by law or by our prior opinion in *DTE I* from challenging DTE's preconstruction projections") (lead opinion); *id.* at 744 (*DTE I* held that EPA "may use its own expert's preconstruction predictions to force DTE to get a PSD construction permit") (Batchelder, J., concurring).

The *DTE II* holding that EPA can "challeng[e] DTE's preconstruction projections" through its own experts' "preconstruction predictions" is consistent with the *DTE I* holding that a "preconstruction projection is subject to an enforcement action by EPA." *Compare DTE II,* 845 F.3d at 740, 744 *with DTE I*, 711 F.3d at 652.

B. The decision does not conflict with decisions of other courts of appeals or otherwise present an issue of exceptional importance.

The paradigmatic basis for exceptional importance—a conflict with other appellate courts, *see* Fed. R. App. P. 35(b)(1)(B)—is not present here. No other appellate court has addressed the argument that EPA is precluded from bringing an enforcement action challenging a source's preconstruction emissions analysis, and DTE does not suggest otherwise.

To the contrary, accepting DTE's interpretation of *DTE I* would *create* tension between the decisions of this Circuit and other courts. While no other appellate court has considered the precise question raised by DTE on appeal, an appellate consensus exists on two points fatal to DTE's argument. *First*, seven circuits have explained that, where there is a sufficiently large projected emissions increase, an NSR violation occurs "when construction commences without a permit in hand."[1] *United States v. Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013). *Second*, because liability can occur at construction, EPA has authority to bring an enforcement action based on what the source "expected, or should have expected" at construction. *Alabama Power*, 730 F.3d at 1282.[2] Taken together, these two points indicate that preconstruction predictions can be challenged and result in NSR liability, just as *DTE II* holds.

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[1] *See also Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 671-73 (10th Cir. 2016); *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 284-85 (3d Cir. 2013); *Texas v. E.P.A.*, 726 F.3d 180, 190 (D.C. Cir. 2013); *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1014 (8th Cir. 2010); *CleanCOALition v. TXU Power*, 536 F.3d 469, 478 (5th Cir. 2008); *Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322-23 (11th Cir. 2007). *DTE II* is consistent with these cases.

[2] *See also Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 571 (2007) (noting claims based on allegation that projects "would have been projected to result" in increased operation); *United States v. Cinergy Corp.*, 623 F.3d 455, 459 (7th Cir. 2010); *United States v. Ameren Missouri*, No. 4:11 CV 77 RWS, 2017 WL 325237, at *67 (E.D. Mo. Jan. 23, 2017); *United States v. Duke Energy Corp.*, 5 F. Supp. 3d 771, 782 n.6 (M.D.N.C. 2014); *United States v. La. Generating, LLC*, 929 F. Supp. 2d 591, 593 (M.D. La. 2012); *Nat'l Parks Conservation Ass'n, Inc. v. Tenn. Valley Auth.*, 618 F. Supp. 2d 815, 829 (E.D. Tenn. 2009); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 865, 881 (S.D. Ohio 2003); *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692 C-M/F, 2002 WL 1629817, at *2-3 & n.3 (S.D. Ind. July 18, 2002).

Where a proper preconstruction analysis would show an increase large enough to trigger review, the Clean Air Act "unambiguously prohibit[s] a major emitting facility from commencing construction without a PSD permit . . . and § 167 unambiguously authorize[s] EPA to enforce that prohibition." *Texas v. E.P.A.*, 726 F.3d 180, 190 (D.C. Cir. 2013) (citing 42 U.S.C. §7477). DTE's proposed interpretation would make the Sixth Circuit the sole court to conclude—under a program intended to "assure" that any increased air pollution would only occur after "careful consideration" of "all consequences," *see* 40 U.S.C. § 7470(5)—that NSR applicability cannot be challenged until the emissions increase has occurred.

Without a circuit conflict, DTE is forced to look farther afield for a basis for its exceptional importance claim. DTE suggests that the mandate is unclear and review is needed to clarify the law for other emissions sources within the circuit. *See* Pet. 18. To the contrary, the controlling law in the circuit *is* clear, as is the mandate for the district court. *See* Section I.A., *supra*. As the concurrence explains, the "inescapable actual holding [of *DTE I*] was that USEPA may use its own expert's preconstruction predictions to force DTE to get a PSD construction permit." *DTE II*, 845 F.3d at 744. Upon remand, the district court can hear evidence of what DTE should have expected at the time of construction. *See DTE II*, 845 F.3d at 740, 744; *see also* p. 6, n.3 *supra* (citing cases describing analysis).

Even if the decision were unclear, that does not establish importance. Indeed, DTE presents no argument that the narrow question decided in *DTE II*, regarding the

appropriate interpretation of the regulations at issue here, has far-reaching importance; no courts have adopted DTE's argument, nor is there any indication any other defendant in this circuit has even raised it.

Finally, DTE contends that review is warranted because one of the panel judges dissented in its favor in *DTE I* and a different panel judge did so in *DTE II*. *See* Pet. 1. But each decision presented a different legal question that was agreed to by a majority. And, of course, it is hardly uncommon for a judge to be bound by precedent he or she does not agree with. *See Mitts v. Bagley*, 626 F.3d 366, 369 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing en banc) (noting disagreement with panel decision while voting against rehearing en banc).

II. THE PETITION FOR PANEL REHEARING SHOULD BE DENIED.

The purpose of panel rehearing is to "bring a claimed error of fact or law in the opinion to the panel's attention. It is not to be used for re-argument of issues previously presented." Sixth Circuit I.O.P. 40(a)(1). DTE's petition does not meet that standard. Rather, DTE's only argument for panel rehearing is that the Court misunderstood *DTE I*. Yet the interpretation of *DTE I* was the fundamental issue before the Court in the second appeal, and the points DTE raises in its petition were extensively briefed, as described below.

Second-Guessing and Law of the Case (Pet. 11-12, 14-18). In arguing that EPA enforcement is not allowed here, DTE seeks to make the initial decision's

caution about second-guessing "*the core principle*" of *DTE I*. Pet. 12 (emphasis added). It is not. As *DTE II* explains, the "inescapable" holding of *DTE I* was that EPA must be able to enforce based on preconstruction projections. *See* Section I, *supra*. The second-guessing language of *DTE I* must be read in light of the holding, not the other way around, as DTE would have it. This issue was briefed extensively in the second appeal, the panel understood it, and so it is not appropriate for panel rehearing. *See, e.g.*, DTE Merits Brief, pp. 46-50, 54-61.

Sufficiency of Notice (Pet. 10-11). As DTE notes, the district court found that the timeliness and sufficiency of the company's preconstruction notice to the state did not violate recordkeeping rules. *DTE I*, 711 F.3d at 649. But the fact that the company's notice was *procedurally* sufficient does not mean that it provided a substantive basis to overcome NSR liability, contrary to DTE's apparent contention now. Moreover, the effect of the district court's ruling on notice was covered in the *DTE II* briefing. *See, e.g.*, DTE Merits Brief, pp. 61-63.

Post-Construction Emissions (Pet. 12-13). DTE continues to argue that post-construction emissions are "essential" to determining whether a project is a major modification. But DTE does not challenge the citations provided by the lead opinion, which show that each judge found post-project emissions increases were not necessary to proving a violation. *See DTE II*, 845 F.3d at 741 (noting "that the panel unanimously agrees . . . that actual post-construction emissions have no bearing on the question of whether DTE's preconstruction projections complied with the

regulations."). The issue was thoroughly covered in the briefing for the second appeal. *See, e.g.*, DTE Merits Brief, pp. 28-30, 46-50. Moreover, while potentially relevant on remand in the context of injunctive relief, other remedies, settlement, or the exercise of enforcement discretion, subsequent installation of pollution control equipment will likely be irrelevant to preconstruction expectations. On remand, this would be a factual issue for the district court to evaluate. Notably, in this case, the district court ordered DTE at the outset of this case not to exceed its prior emissions levels. *See DTE II*, 845 F.3d at 749 (Rogers, J., dissenting); RE 29, Page ID 1005-06.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions.

Respectfully submitted,

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April 3, 2017

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This opposition complies with the length requirement set by the Court (March 6, 2017 Letter) because the text of the opposition is within 10 pages. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because I prepared it using 14-point Garamond type.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing brief upon counsel of record using the Sixth Circuit's electronic case filing system.

In addition, I served a copy of the foregoing brief, by email and the Court's electronic filing system, upon counsel in the related appeal, No. 14-2275:

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